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No. 75-166

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

FIDELITY TELEVISION, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and
RKO GENERAL, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RKO GENERAL, INC. IN OPPOSITION

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OPINIONS BELOW

The opinions of the court of appeals affirming the decision of the Federal Communications Commission and denying rehearing, reconsideration and suggestions for rehearing *en banc* are reported at 515 F.2d 684. The opinion of the Federal Communications Commission is reported at 44 F. C.C. 2d 123.

JURISDICTION

The judgment of the court of appeals was entered on March 6, 1975. A petition for rehearing and reconsideration and a suggestion for rehearing *en banc* were denied on June 30, 1975. The petition for certiorari was filed within ninety days thereafter. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED FOR REVIEW

Whether the court of appeals committed error in affirming a decision of the Federal Communications Commission which found, in a comparative licensing proceeding, that the public interest would be served by renewing the license of the incumbent licensee and denying the mutually-exclusive application of the challenger, the decision being conditioned on the outcome of an issue in a proceeding still pending before the Commission.

STATEMENT OF THE CASE

RKO General, Inc. has operated Station KHJ-TV, Channel 9, Los Angeles, California, since 1951 and received from the Federal Communications Commission successive renewals of its operating authorization at normal three-year intervals through November 1965. In that year, after RKO filed its application for renewal of license, Fidelity Television, Inc. filed an application to build a station at Norwalk, California, also on Channel 9. Since only one of the two applications could be granted and they, therefore, were mutually exclusive, the Commission designated them for a comparative hearing. On December 6, 1973, after a lengthy hearing and the issuance of an initial decision by the hearing examiner, the Commission rendered its decision granting RKO's renewal application and denying Fidelity's competing application — conditioned on the outcome of an issue in another proceeding now pending before the Commission in which RKO and Fidelity are among the participants.

In reaching its decision favoring RKO over Fidelity on the basis of the record then before it, the Commission took into account, but declined to follow, the initial decision of the hearing examiner in favor of Fidelity's application, which he had reached, as he said, "without much enthusiasm." A. 280a. The Commission reviewed KHJ-TV's past broadcast record — which matched the promises it had made to the Commission in its previous renewal application — and decided that it was an "average" performance. Therefore, RKO was accorded neither a preference nor a demerit on that score.[1]

In assessing the applicants with respect to media diversification, the Commission found that in the Los Angeles area there are a plethora of media outlets for diverse and antagonistic views, including 15 assigned television stations, 126 AM and FM stations, and a number of newspapers. It also found no evidence of any attempt by RKO to influence the operation of KHJ-TV so as to promote any national or other uniform expression of political, economic or social opinion, and that, although RKO clearly had more media interests than Fidelity, the nature of RKO's interests was not such as to have any adverse effect on the free flow of information for the audience to be served. The Commission also noted that RKO's ownership of KHJ-TV had been in compliance with the Commission's regulations and consistent with the public interest at all times since the station was acquired. Under these circumstances, the Commission determined that

[1] Since its acquisition by RKO in 1951, KHJ-TV has operated as an independent station, competing in the Los Angeles market with six other VHF stations, three of which were at all times owned and operated by the networks, CBS, NBC and ABC.

neither applicant was entitled to a preference under the diversification criterion.

The Commission also concluded that neither applicant should be awarded a preference under the criterion of integration of ownership and management. It declined to adopt the hearing examiner's conclusion that Fidelity should be assessed a demerit for its integration proposal which placed inexperienced stockholders, working part-time, in supervisory positions and which the hearing examiner characterized as a foolish bit of business which had little chance of being effectively implemented. A. 278a-279a. The Commission found that RKO had afforded considerable autonomy to the local staff in the operation of KHJ-TV and had required mangement of the station to be involved in a wide range of community and civic organizations and to use the information to help determine the direction and programming of the station. It found that during RKO's operation of KHJ-TV since 1951, station personnel living in the Los Angeles area had participated in community activities and acquired broad knowledge of local needs. When the Commission considered these factors in the light of Fidelity's demonstrated inability or unwillingness to carry out its responsibilities in prosecuting its application, it found that Fidelity's quantitative advantage had been neutralized by the adverse qualitative characteristics of its proposal and that, on balance, a preference for neither applicant was warranted under the integration criterion.

Finally, the Commission held that such trade relations activities (reciprocal dealings or mutual patronage) involving KHJ-TV as were disclosed by the record in this case were not the result of either coercion or threats of reprisal and, at worst, affected only an insubstantial amount of commerce. Considering the uncertain legal status of these practices at that time, the Commission could find no basis for charging RKO with knowing and willful misconduct. They raised no meaningful question of RKO's willingness

and ability to act in a responsible manner in performing its obligations as a licensee of KHJ-TV, particularly in the light of RKO's unblemished record as a broadcaster covering more than 25 years. Although the Commission determined that, on the basis of the hearing record in this case, no comparative demerit against RKO was warranted, it noted that the trade practices of RKO and its parent, The General Tire & Rubber Company, was an issue in a pending comparative renewal proceeding involving RKO's Boston station, WNAC-TV, and that Fidelity was a party to the latter proceeding on the issue pertaining to the trade practices.

To summarize, the Commission determined that RKO and Fidelity were essentially on a par under each of the comparative criteria. It decided that it was preferable to renew the license of KHJ-TV since, in a situation in which a challenger will provide no better service than the incumbent, the Commission was convinced that the public interest in the continuity of existing service as well as the public interest in reasonable stability which is necessary to induce efforts and investments in broadcasting required that the incumbent be preferred. A. 108a. The decision in favor of RKO over Fidelity was, however, conditioned on the outcome of the Boston proceeding so far as it might be deemed to affect RKO's licensee qualifications.

The Commission's decision was unanimously affirmed by the court below in a decision which treated all of the issues raised by Fidelity. The court stated that it regarded its task as "scrutiny of the F.C.C.'s ultimate decision in the light of the standards for comparative renewal hearings developed by the agency in the past," and that in its function as a reviewing court:

> "It is necessary only that we satisfy ourselves that the agency acted within the bounds of its statutory and constitutional authority, that it has followed its own procedural rules and regulations, that its

> findings of fact are reasonably articulated and based on substantial evidence in the record as a whole, that its conclusions do not deviate greatly from past pronouncements without sufficient explanation, and that in general it has engaged in reasoned decision-making."[2]

Having found no legal error in the Commission's ultimate conclusion that Fidelity, if awarded the license, would provide no better service to the public than RKO had provided in the past and would continue to provide in the future, the court held that the Commission had not erred in awarding the license in these circumstances to the incumbent rather than the challenger who "offers little more and is likely in fact to provide somewhat less than the incumbent." A. 32a.

The court below summarized its decision as follows:

> "It is worth emphasizing the special posture of this particular case. It is based on a record built under standards which have since been upgraded or modified or reconsidered by the Commission. New community ascertainment criteria have been issued and there is now a requirement for something of a continuing dialog between a station and its audience. The agency has also undertaken its rule-making process on cross-ownership. The development, through rule-making, of standards of 'substantial performance' also seems imminent and should prove helpful. We hold here only that under the former criteria the Commission, when faced with a poor challenger who offers little more and is likely in fact to provide somewhat less than the incumbent, did not commit reversible error by awarding the license to the incumbent."[3]

[2] A. 24a-25a (footnotes omitted).

[3] A. 32a (footnote omitted).

Petitions for rehearing, reconsideration or clarification and suggestions for rehearing *en banc* were denied by the court below in a *per curiam* opinion, with Chief Judge Bazelon issuing a statement as to why he voted to grant rehearing *en banc*.

ARGUMENT

1. This case presents no issue which warrants review by this Court. As the Court below properly decided after an exhaustive examination of all of the objections raised by the petitioner, the Commission's judgment to renew a broadcast license upon finding that the public interest, convenience and necessity would be served thereby was supported by substantial evidence in the record and was entirely consistent with statutory requirements and judicial precedents. The determination was singularly within the discretion of the Commission for, as this Court has stated, "[I]t is the Commission, not the courts, which must be satisfied that the public interest will be served by renewing the license. And the fact that we might not have made the same determination on the same facts does not warrant a substitution of judicial for administrative discretion since Congress has confided the problem to the latter." *FCC v. WOKO, Inc.*, 329 U.S. 223, 229 (1946). All of the arguments which are properly raised here by the petitioner were carefully considered and correctly resolved by the court below, and since there is no issue presented which warrants the attention of this Court, certiorari should be denied.

2. This case is also singularly inappropriate for review by this Court, since the court below explicitly limited its holding in this case to the unique facts presented. A. 32a. The limitation was reemphasized in the *per curiam* opinion denying rehearing and reconsideration. A. 34a-38a. Furthermore, the decision below is, in any event, of a conditional nature, being dependent as it is on the outcome of another proceeding now pending before the Commission

involving an issue (in which Fidelity is participating) relating to RKO's licensee qualifications.

3. Fidelity's primary argument in support of its request for certiorari is that the First Amendment should be construed to require the Commission to award a comparative preference to the applicant with the fewer media interests. Fidelity did not raise this argument in the court below, and it cannot be raised now for the first time in this Court.[4] Moreover, the contention is wholly without merit. The First Amendment prohibits a restraint against freedom of speech; it cannot be stretched to command the affirmative selection by a governmental agency of the applicant which shall receive an operating authority where only one channel is available because of technical signal interference considerations. Fidelity's reliance on *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) is misplaced. That case had nothing to do with the selection of an applicant for a broadcast license, related to a fairness doctrine matter, and indeed resulted in a denial by this Court of the claim of First Amendment protection. We have no quarrel with the proposition that the presentation of the greatest possible diversity of information and ideas in a particular community and in the nation as a whole is a regulatory goal toward which the Commission should strive in its regulation of broadcasting in the "public interest." However, the selection of the regulatory approach which will best encourage such diversity in a particular situation should be left to the sound discretion of the Commission. The Court should not freeze a particular approach into a constitutional holding. In the instant case, the Commission, well within the ambit of its statutory discretion, reasonably decided that there were no material differences between the applicants concerning presentation of diverse ideas which would warrant the award of any preference under the diversification criterion.

[4] *See* Duignan v. United States, 274 U.S. 195, 200 (1927).

4. Fidelity's contention that the Commission, in its examination of RKO's involvement in trade practices, improperly focused on the legality of mutual patronage under the antitrust laws misconstrues the decision. To the contrary: the Commission first determined that KHJ-TV was not engaged in an unfair trade practice consisting of mutual patronage resulting from either coercion or threats of reprisal, found that KHJ-TV was involved in a number of mutual patronage situations which were normal at the time, and then specifically addressed itself to the question whether this conduct should reflect adversely upon the character of RKO or its operation of the station. The Commission determined that no adverse conclusion was warranted as a result of the conduct, because the relevant legal and economic concepts were in a state of flux at the time, many other corporations engaged in similar trade relations practices during the period, and there was no basis, in any event, for any finding of knowing and willful misconduct on the part of RKO. When these and other facts cited by the Commission were considered in the light of RKO's unblemished record as a broadcaster covering more than 25 years, the Commission held that no meaningful question was raised about RKO's willingness and ability to act in a responsible manner as a licensee. This determination was clearly a reasonable exercise of the Commission's discretion as to RKO's character as a licensee and the nature of its prospective performance.

5. Fidelity has no sound cause to complain of the Commission decision not to give it a preference for its integration proposal. Pet. 21. This decision was a reasonable exercise of the Commission's discretion and hence not appropriate for independent determination by the court below or this Court. Indeed, in not imposing a demerit, the Commission was generous to Fidelity which had received a demerit from the hearing examiner. Contrary to Fidelity's assertion (Pet. 21), the Commission's conclusion that there

was little promise of effective implementation of Fidelity's paper proposal rested not on mere "allegations" but on undisputed facts which had either been asserted or admitted by Fidelity or its attorneys or were matters of record. A. 106a-107a and n. 28. The Commission reasonably inferred from these undisputed facts that management of a station by persons who had demonstrated in prosecuting their application at the very least an "inability" to comply with the Commission's Rules and Regulations was not to be preferred over management of a station by experienced professionals who had an unblemished record of compliance over many years of operation. Furthermore, as the court below noted (A. 28a-29a), the record contained other substantial evidence in the form of the examiner's decision which supported the Commission's conclusion concerning the implementation of Fidelity's integration proposal. Discernment by the examiner of the character of Fidelity's proposed supervisory management and of their ability to perform, based on observation of them as witnesses, may not be disregarded by the agency, absent countervailing considerations — none of which appear on this record. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951). In any event, the crux of the Commission's determination not to award any preference to either applicant under the criterion of integration of ownership and management was that RKO's operation of KHJ-TV, in practice, achieved the goals of the integration policy, and that the paper proposals of Fidelity would have done no more.

6. Finally, there is no foundation for Fidelity's contention that statutory provisions to the effect that a licensee obtains no property rights in the frequency it utilizes were violated by the Commission's preference of RKO over Fidelity. The decision recognized no property right in the frequency. The Commission did not base its decision, as Fidelity suggests (Pet. 25), on "a preference for the *fact* that it [KHJ-TV] was operating on the frequency." First, the

Commission found equilibrium in the comparative merits of RKO and Fidelity and then, recognizing that RKO's financial stability had provided an experienced and competent staff for KHJ-TV and afforded the station an opportunity to develop and strengthen its programming and community involvement and to conduct a viable operation in a highly competitive market, it determined that the public interest in the continuity of existing service and in the predictability and stability of broadcast service —without which the overall development and motivation of the industry would suffer — required that the incumbent's license be renewed in the special circumstances of this case. The Commission's decision was neither arbitrary in any way nor beyond its statutory or constitutional authority. Thus, the court below properly concluded that it must be affirmed.

CONCLUSION

The decision below, constituting an affirmance of the determination of a regulatory agency reasonably reached, is correct; there is no conflict of decisions; and no questions warranting further review are presented. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted,

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